In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1173

UNITED MARINE DIVISION, LOCAL 333, NATIONAL MARITIME UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 417 F. 2d 865. The Board's decision and order (Pet. App. 11a–15a; A. 29–33)[1] are reported at 166 NLRB No. 9.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1969 (Pet. App. 9a–10a). The petition for a writ of certiorari was filed on February 12,

[1] "A." references are to the appendix filed in the court below.

1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly ordered the union, jointly and severally with the company, to compensate an employee for the loss in earnings resulting from the unlawful discrimination which the union had caused.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2–5 of the petition.

STATEMENT

The Company provides marine towing and related services in and around the New York City waterfront (A. 10; 93). Petitioner Union and the Company are parties to a collective bargaining agreement, covering engineers and certain other employees of the Company, which contains a union-security clause requiring membership in the Union as a condition of employment (A. 7; 84–85, 236, 243). John Obermeier was one of the employees covered by the collective bargaining agreement (A. 7; 84–85, 86).

On June 1, 1966, Obermeier attended the Union's regular monthly meeting which was conducted by Captain O'Hare, the president and general manager of the Union (A. 95–96). During the meeting Obermeier criticized O'Hare's leadership of the Union, stating that O'Hare had been "working for the boat-

owners" (A. 31). O'Hare warned Obermeier that he was risking his job by making such remarks, but Obermeier persisted in his criticism (A. 254, 257).

The Union grievance committee met on July 20, 1966, to consider charges filed by O'Hare against Obermeier (A. 32; 245). At that meeting, Obermeier made clear that his criticism was directed to an incident three years before, in which the Union complied with a request by the Company to reduce the number of employees on the boats (A. 258–260). Obermeier was particularly critical of the way the Union reached that decision, stating that "anything the employers want they always manage to get somehow or other" (A. 255–256). When asked whether he meant to imply that O'Hare was getting paid by the Company "for doing something that was detrimental to the membership of the Union," Obermeier admitted that such implication was possible. But, he added: "I do not know, cannot prove, cannot say definitely that he was getting paid, no" (A. 288). Obermeier maintained that his statement was "spontaneous," that he had not thought of its implications, and that he had not meant to reflect on O'Hare's reputation or to cause him to lose his job (A. 255, 259, 296). Although insisting that he had not changed his opinion of O'Hare, Obermeier indicated that he regretted what he had said at the meeting and would not say the same thing again (A. 257–258, 298, 301).

On the basis of the statement made at the June meeting and the testimony at the grievance committee hearing, Obermeier was suspended from membership in the Union for six months and deprived of

his union privileges for one year (A. 7; 98). By letter dated September 8, 1966, O'Hare informed the Company of this action and requested that Obermeier be "relieve[d] * * * of his duties immediately" (A. 7; 99–100, 244). When Obermeier reported to work that day, he was informed by a Company official that they had received the Union's letter and, since he was no longer a member in good standing, he had to be discharged (A. 7; 98–100).

Upon unfair labor practice charges filed by Obermeier, the Board found that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing the Company to discharge Obermeier because he was no longer a member in good standing as a result of remarks made at a union meeting (Pet. App. 11a–15a; A. 8, 16–17).[2] The Board, *inter alia,* ordered the Union, jointly and severally with the Company, to make Obermeier whole for any loss of earnings he may have suffered as a result of his discharge, and to notify the Company, in writing, that the Union had no objection to Obermeier's employment (Pet. App. 15a; A. 17–23). The court of appeals sustained the

[2] The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging Obermeier for that reason (A. 16). The Board rejected the Company's contention that, in any event, it was justified in refusing to reinstate Obermeier because his remarks imputed criminal conduct to the Company, which he refused to disavow. The Board found that Obermeier's remarks were pertinent to a debate involving internal union affairs, were not deliberately or maliciously false, and thus were protected by Section 7 of the Act. (Pet. App. 14a.) The Company has complied with the part of the Board's order directed against it.

Board's findings and enforced its order (Pet. App. 1a–8a).

ARGUMENT

Petitioner does not contest the Board's finding, approved by the court of appeals, that it caused the Company to discharge employee Obermeier for a reason barred by the Act.[3] Its sole contention is that the Board's backpay order is improper because the Company, in any event, would have declined to reinstate Obermeier because of the alleged defamatory remarks which he made against the company and which he had refused to retract (*supra,* n. 2). The Board found, however, that Obermeier's remarks would not have justified the Company's refusal to reinstate him (*ibid.*). Moreover, in view of the Union's conceded responsibility for Obermeier's discharge and its continued objection to his reinstatement unless he retracted his charges against Union official O'Hare (see A. 69–71, 83–84), the Company's attitude cannot be separated from the illegal consequences of the Union's action. The fact that the Board accepted as true the Company's assertion that it offered to reinstate Obermeier if he would disavow any imputation of wrongdoing did not, as the Union suggests,

[3] Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee * * * with respect to whom membership in such organization has been * * * terminated on some ground other than his failure to tender periodic dues * * *." The Union procured Obermeier's discharge, not because of dues delinquency, but because of the opposition to the Union president which Obermeier had expressed at a union meeting.

constitute a finding that the refusal of reinstatement was solely attributable to the Company. On the facts here, it cannot be said that the Union's own objection to Obermeier's working for the Company did not play some part in the formulation of the Company's position with respect to his reinstatement. Accordingly, the court below properly concluded that there was no valid reason for relieving the Union of backpay liability. See *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 54–55.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1970.